

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DARREN W. WALTON**  
Claimant

VS.

**WRIGHT TREE SERVICE, INC.**  
Self-Insured Respondent

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Docket Nos. **1,052,428 &  
1,052,429**

**ORDER**

Self-insured respondent requests review of the November 3, 2010 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

It was undisputed claimant suffered two separate work-related accidents while employed by respondent. The primary issue raised at the preliminary hearing was whether there is jurisdiction under the Kansas Workers Compensation Act (Act) for these accidental injuries that occurred out of state.

The Administrative Law Judge (ALJ) found claimant's contract of employment with respondent was made in Kansas. Consequently, the ALJ determined the parties were subject to the Act and ordered respondent to provide claimant medical treatment.

Respondent requests review of whether claimant and respondent were covered by the Act. Respondent argues the offer and acceptance of employment occurred in Missouri, the principal place of business was Missouri and the accidents occurred outside Kansas. Accordingly, respondent further argues the parties are not subject to the Act.

Claimant initially argues the Board does not have jurisdiction on an appeal from a preliminary hearing to address the issue raised by respondent. In the alternative, claimant argues the contract was made in Kansas and the ALJ's Order should be affirmed.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction over the issue of whether the parties are subject to the Act?

2. Was claimant's contract of employment formed in Kansas, which would bring this claim under the jurisdiction of the Act.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Initially, the claimant argues the Board does not have jurisdiction on an appeal from a preliminary hearing to address the issue raised by respondent. The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only those issues listed in K.S.A. 44-534a(a)(2). Those are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>1</sup> In this case the respondent has denied that the parties are subject to the Act. The issue raised is a defense which disputes the compensability of the injury under the Act and consequently is an issue that the Board has jurisdiction to address on an appeal from a preliminary hearing order.

Respondent admits claimant's accidental injuries arose out of and occurred during the course of employment in both dockets. But respondent argues that Kansas does not have jurisdiction in these claims because both accidents occurred out of the state and the contract of employment between claimant and respondent was finalized in Missouri.

Claimant testified that he was advised by his brother that respondent was hiring. Claimant's brother was working as a foreman for respondent. They both live in Galena, Kansas. His brother brought an application home and gave it to claimant to complete. While at his brother's house, claimant returned the application to his brother. The next day claimant was notified by his brother in Galena, Kansas, that respondent had offered claimant a job which he accepted. Claimant testified he then started working for respondent the next day and was paid for that work. And claimant further testified that after he had worked he had additional paperwork that needed to be completed which he received after he had accepted the job.

On cross-examination, claimant testified:

Q. (By Mr. Lawson) That was a Monday. Did you start on a Monday?

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<sup>1</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

A. I don't remember.

THE COURT: But it's your testimony that you were hired before that?

A. I took it that I was hired when he told me I had the job.

THE COURT: And when was that?

A. Like a day or day before that, sir.

THE COURT: Okay.

Q. (By Mr. Lawson) Whenever it was the day that he told you that you have the job, as I understand your testimony you went in and began working the next day. Was that right?

A. Yes.

Q. And if I remember your testimony from your deposition correctly, you did not take a drug test for this. Is that right?

A. At that time, no.<sup>2</sup>

Claimant testified that he took a drug test sometime after he had already started working. And he continued to work even after he took the drug test. Claimant testified his brother offered him the job at his house in Kansas and claimant accepted to start work that Monday in Missouri.

Conversely, Jeff East, respondent's project manager, testified that once an individual acquires an application the first part needs to be completed and returned to respondent. Respondent reviews the application and determines whether or not the individual is suitable for employment. If so, the individual is contacted for an interview and then Part 2 of the application is completed. If the individual is offered a job, then a pre-employment drug test screen is required. Lastly, if a positive drug test has occurred, then the individual is not hired. Mr. East testified that an interview is always conducted. Mr. East further testified that claimant would not have been allowed by his foreman to start work without having filled out all of the paperwork. But Mr. East agreed he did not participate in the interview or hiring process for claimant.

William Curt Cline, respondent's general foreman, testified that claimant's interview took place on 32nd street in Joplin, Missouri. Mr. Cline was aware that claimant's brother had taken a job application to Mr. Walton.

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<sup>2</sup> P.H. Trans. at 13-14.

Q. Then what took place at that interview?

A. I looked over his application and made sure I looked at his driver's license and so forth, and told him I didn't have an opening<sup>3</sup> and that I would have to set him up for a drug screen if he would go take a drug screen. And I did call at that time, and they said they could do it that day.

Q. Did you extend an offer of employment to Mr. Walton at that time?

A. Yeah, on the condition that his drug screen was okay.<sup>4</sup>

Mr. Cline testified claimant took the drug screen test at Freeman Occu-Med in Joplin, Missouri. Mr. Cline stated that claimant's first day of work was Monday, April 13, 2010, in Missouri. And that he called claimant and told him that he passed the drug screen test. In the call Mr. Cline made to claimant to tell him the results of the drug screen he told claimant that if he wanted to go to work he was to show up in Missouri on Monday morning.

Mr. Cline testified:

Q. When you spoke with him on the phone, what did you tell him?

A. I told him that the office had notified me about the results of his drug screen and he was okay to go to work. If he wanted to go to work, be up here Monday, Monday morning.<sup>5</sup>

The initial issue to address is whether there is jurisdiction under the Act. It is undisputed claimant's accidental injuries occurred in Missouri and Arkansas. The Act confers jurisdiction in some cases where the injury is sustained outside the state. The two provisions that confer Kansas jurisdiction are (1) if the principal place of employment is within the state, or (2) the contract of employment was made within the state, unless the contract specifically provides otherwise.<sup>6</sup>

K.S.A. 44-506 provides:

The workmen's compensation act shall not be construed to apply to business or employment which, according to law, is so engaged in interstate commerce as to

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<sup>3</sup> It is not explained how or why claimant was hired when respondent did not have an opening.

<sup>4</sup> P.H. Trans. at 29-30.

<sup>5</sup> *Id.* at 39.

<sup>6</sup> *Abbey v. Cleveland Inspection Services, Inc.*, 30 Kan. App. 2d 114, 41 P.3d 297 (2002).

be not subject to the legislative power of the state, nor to persons injured while they are so engaged: *Provided*, That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: *Provided, however*, That the workmen's compensation act shall apply to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of the state of Kansas and to all projects, buildings, constructions, improvements and property belonging to the United States of America within said exterior boundaries as authorized by 40 U.S.C. 290, enacted June 25, 1936.

Claimant does not argue nor do the facts establish that his principal place of business was to be Kansas. Accordingly, the dispositive issue is whether claimant's contract of employment was made in Kansas.

In *Shehane*<sup>7</sup>, the Court held:

The basic principle is that a contract is "made" when and where the last act necessary for its formation is done. *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975). When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973).

In this case, the claimant either accepted a job offer from his brother in Galena, Kansas, or during his interview with Mr. Cline in Joplin, Missouri. Claimant testified that he started work before he completed the paperwork and had worked both before and after he took the drug screen test. Mr. Cline provided a different version of the job offer and acceptance. Mr. Cline testified that he made the offer of employment and claimant accepted while sitting in Cline's truck in Joplin, Missouri. Mr. Cline further testified claimant was told he would have to complete a drug screen. And Mr. Cline stated that if claimant did not successfully complete the drug screen he would not be able to work for respondent. Mr. Cline testified that he had no knowledge whether claimant had actually performed any work for respondent before he interviewed claimant but that no employees are ever allowed to do any work for respondent before the results of the drug screen are received.

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<sup>7</sup> *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).

In *Speer*<sup>8</sup> the Court of Appeals determined that the requirements to pass driving tests, drug screening and orientation were conditions precedent and had to be successfully completed before the employment contract was completed.

Different from the facts of *Shehane*, there is no written contract here indicating that the drug test, orientation, and other required paperwork were conditions subsequent to Speer's employment with Sammons. Moreover, it is apparent that Sammons would not have given Speer the keys to one of its trucks unless Speer had first satisfied these conditions. Speer admitted in his deposition testimony that passing the drug test was a condition that he had to meet before he would be hired. One might characterize Sammons' offer to Speer as follows: Sammons says to Speer, "Speer, if you will take and pass a drug test, complete orientation, fill out and sign required paperwork, Sammons will hire you." The taking and passing of the drug test and completing the other conditions must exist as a fact before there is any liability on Sammons to hire Speer. This was a condition precedent rather than a condition subsequent. Black's Law Dictionary 312 (8th ed.2004) defines a condition precedent as "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises." Even if Sammons' representative Otis communicated a counteroffer to Speer during the telephone conversations, this counteroffer had conditions precedent that were not fulfilled until Speer completed the drug test, orientation, and paperwork while he was in Montana.

In summary, the satisfaction of these conditions was a prerequisite to the employment contract coming into existence.<sup>9</sup>

The claimant's interview, completion of the paperwork, drug screen and finally showing up for work all were performed and completed in Missouri. Accordingly, the last acts necessary to form or complete the contract occurred in Missouri. This Board Member finds that the determination by the ALJ that the Act applies to this fact situation is reversed and claimant's request for benefits denied.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>10</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>11</sup>

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<sup>8</sup> *Speer v. Sammons Trucking*, 35 Kan. App. 2d 132, 128 P.3d 984 (2006).

<sup>9</sup> *Id.* at 144-145.

<sup>10</sup> K.S.A. 44-534a.

<sup>11</sup> K.S.A. 2009 Supp. 44-555c(k).

**WHEREFORE**, it is the finding of this Board Member that the Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated November 3, 2010, is reversed and claimant's request for benefits is denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2011.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Brandon A. Lawson, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge